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No.

In the Supreme Court of the United States

OCTOBER TERM, 1976

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Federal Communications Commission petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A,[1] pp. 1–60) has not yet been reported. The orders of the Federal Communications Commission (Apps. B and C, pp. 61–158) are reported at 50 FCC 2d 1046 and 53 FCC 2d 589.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1977 (App. D, pp. 159–160). A partial stay of mandate was granted by the court of appeals on April 5, 1977 (App. E, pp. 161–167), and this petition for certiorari is being filed within the time allowed by the court. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

[1] The appendices to this petition are set forth under separate cover.

QUESTION PRESENTED

Whether the court of appeals exceeded the proper role of a reviewing court (1) by substituting its judgment for the judgment of the Federal Communications Commission that, in the absence of a showing of public harm, public interest considerations, which warranted the adoption of rules forbidding new broadcast-newspaper combinations in the same community, did not, on balance, warrant across-the-board divestiture of existing, previously approved, combinations, (2) by holding that the Commission could not limit divestiture to combinations which the Commission concluded constituted effective local media monopolies and (3) by requiring the Commission to order across-the-board divestiture of all existing combinations except on individual showings of exceptional circumstances.

STATUTES INVOLVED

Sections 2(a), 4(i), 4(j), 301, 303(g), 309(a) and 309(d)(1) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§ 152(a), 154(i), 154(j), 301, 303(g), 309(a) and 309(d)(1), are set forth in App. F, pp. 168–170.

STATEMENT

1. This petition seeks review of an opinion (App. A, pp. 1–60) and judgment (App. D. pp. 159–160) invalidating those portions of the so-called multiple ownership rules of the Federal Communications Commission which provide for divestiture by co-located newspaper-broadcast combinations which, in the Commission's view, constitute effective local media monopolies inconsistent with the public interest standard of the Communications Act. The court of appeals has held that the Commission may not confine divestiture to such effective monopoly situations, but must instead adopt a rule requiring the breakup of all co-located newspaper-broadcast combinations, subject to waiver for exceptional cases. The decision of the court, if upheld, would affect more than 50 newspaper-television combinations and more than 120 newspaper-radio combinations in over 130 communities throughout the United States.

2. Until the rules now under review were adopted, the Commission had long encouraged newspaper-broadcast cross-ownership because of the important contribution it believed such owners would make to the development of radio and, later, television broadcasting. For many years, the Commission repeatedly found that licensing broadcast stations to newspaper owners in the same community was in the public interest and otherwise consistent with other agency policies. The instant rulemaking proceeding was initiated in 1970 to determine whether the Commission should continue to sanction such ownership. After a review of all comments submitted and facts of record, the Commission concluded that there were changed circumstances warranting a different policy with respect to newspaper owners applying for new broadcast facilities, but found no such circumstances and no record evidence warranting a new policy requiring across-the-board divestiture of existing newspaper-broadcast combinations. Indeed, the agency found that there were important public interest reasons for grandfathering most existing ownerships.

Thus, by Report and Order, 50 FCC 2d 1046 (App. B, pp. 61–147) the Commission prohibited the establishment of any new co-located newspaper-broadcast combinations, see 47 C.F.R. §§ 73.35(a)(1), 73.240(a)(1), 73.636(a)(1). (App. B. pp. 114–121), and also required divestiture in existing situations where the same party owned, operated, or controlled the only newspaper and the only television station (or, if there was no local television outlet, the only radio station) in a community. All other existing combinations were grandfathered. 47 C.F.R. §§ 73.35(c) and n. 8, 73.240(c) and n. 8, 73.636(c) and n. 8 (*Id.*) [2]

In adopting the above rules, the Commission summarized the record evidence (*Id.*, pp. 67–89), and discussed the various considerations underlying its action, including its legal authority (*Id.*, pp. 63–67), and the policy reasons for adopting its prospec-

[2] However, the prospective rules required that, in any future transactions involving existing combinations, the newspapers and broadcast licenses concerned must be transferred or sold to different parties.

tive rules (*Id.*, pp. 89–93) and for limiting divestiture to situations where the Commission concluded there was an effective local media monopoly (*Id.*, pp. 93–101). The purpose of the prospective rules was to attempt to promote diversity of viewpoints among local mass media. The Commission explained that it was changing its earlier policy of encouraging newspaper-broadcast cross-ownership because the industry had matured and it was no longer necessary to rely on newspaper owners for their experience, resources and willingness to pioneer, which broadcasting once needed. This did not suggest that existing owners were not serving the public interest, but only that the possibility of even a small gain in diversity was worthwhile when it could be achieved without any disruption of existing services (*Id.*, pp. 90–91).

Whether to require divestiture was a very different and difficult problem. First, the record in this lengthy, five-year proceeding did not reveal any specific abuses or evidence of harm to the public arising out of common ownership, let alone any pattern of abuse or harm (*Id.*, pp. 93 n. 26, 94 n. 27, 100, 104). Second, there was, of course, no guarantee that Commission action would increase diversity (*Id.*, pp. 91, 93). Nevertheless, after considering the views and comments of all the parties, the Commission's judgment was that, in communities where it concluded that there was an effective monopoly over local mass media, there was also likely to be a significant absence of competition and diversity, which *prima facie* outweighed other policy considerations, so that divestiture, although a severe remedy, was warranted (*Id.*, pp. 95–99).

In those communities where there was no newspaper-broadcast monopoly, however, the Commission concluded that the potential harm from divestiture outweighed "a mere hoped for gain in diversity" (*Id.*, p. 93). In the Commission's view, "stability and continuity do serve important public purposes" (*Id.*). Although divestiture might increase diversity, it might also disrupt existing operations and unnecessarily deprive the public of licensees who had served it long and well. On balance,

therefore, the Commission determined that, in the absence of any showing of injury to the public interest,[3] across-the-board separation of newspaper-broadcast combinations was an unwise and unnecessary remedy (*Id.*, pp. 93–96). Upon reconsideration, 53 FCC 2d 589 (App. C, pp. 148–158), the Commission reaffirmed its previous order in all pertinent respects.

3. Several parties sought appellate review pursuant to 47 U.S.C. § 402(a). The court of appeals affirmed the Commission's prospective rules, holding that a legislative type policy judgment intended to increase diversity was not irrational even though its benefits were speculative (App. A, pp. 18, 23).

The court vacated, however, the rules requiring divestiture in effective monopoly situations, as well as the grandfathering of other existing combinations. The court held that the Commission had erred because, once having attempted to promote diversity through its prospective rules, it had not adopted an overall and virtually irrebutable presumption, in connection with its retroactive rules, that "cross-owned stations do not serve the public interest" (*Id.*, p. 51). The court held that this presumption was "compelled," not discretionary, and was not overcome by the other policies advanced by the Commission, and that, therefore, a rule of across-the-board divestiture by co-located newspaper-broadcast combinations was required (App. E, pp. 166–167; App. A, pp. 52–60).

The court also found that the Commission was arbitrary and capricious in distinguishing, for the purpose of its divestiture rules, between communities where the Commission concluded that broadcast combinations had an effective monopoly over local mass media, and other communities where such combinations faced competition. In the court's view, it was irrational for the Commission to conclude that the existence of an effec-

[3] The Commission explicitly recognized that "it [was] not necessary to have proof of abuses" before it could require divestiture (App. B, p. 95 n. 29). The absence of such abuses, however, was a relevant factor in balancing the various competing policy considerations. Had the record revealed evidence of misuse or harm arising from cross-ownership, the Commission might have ordered more divestiture (*Id.*, p. 104).

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tive monopoly should control (App. A, pp. 58–59). Thus, in order "that everyone would be equally treated," the court ordered the Commission to adopt a rule, subject to waiver only in exceptional circumstances, requiring across-the-board divestiture (App. E, p. 167; see also App. A, p. 60).[4]

REASONS FOR GRANTING THE WRIT

The Communications Act of 1934, as amended, charges the Commission with the function of regulating broadcasting to serve the "public interest, convenience and necessity," 47 U.S.C. §§ 301, 303, 309(a) (App. F. pp. 169–170). This is a broad mandate which Congress directed the Commission to carry out in light of changing conditions. *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). In exercising that function, the Commission has long attached importance to the policy of diversification of broadcast ownership in the belief that this is likely to contribute to a diversity of viewpoints. The policy favoring diversification, however, has not stood in the way of first encouraging newspaper-broadcast cross-ownership, and then repeatedly finding our many years that existing newspaper-broadcast cross-ownerships were in the public interest. The prospective rule adopted by the Commission, prohibiting such combinations in the future, reflected a change in the industry's maturity which led the Commission to conclude that, in the interests of seeking diversity, it was no longer appropriate to rely upon newspaper owners as an important source of qualified new licensees. On the other hand, there was no evidence of changed circumstances or any pattern of conduct injurious to the public interest which affected the

[4] On April 5, 1977, the court of appeals granted a partial stay of its mandate, but only if the Commission filed a petition for a write of certiorari within seventeen days thereafter (App. E, pp. 161–167). The court stayed that part of its order which vacated the Commission's grandfather rule (and neccessarily related matters) and which required the Commission to adopt, instead, a rule ordering divestiture of all co-located newspaper-broadcast combinations. The court did not stay, however, its affirmance of the Commission's prospective rules, or the court's vacation of the Commission's limited divestiture rule.

value of the continuity of meritorious service provided by existing newspaper-broadcast ownerships. Disruption of that service, where it existed, therefore, was unnecessary and undesirable except where there was a real likelihood that the paucity of owners in a community could adversely affect diversity in that community. But the decision of the court below would require the Commission drastically to change its long-standing policies concerning newspaper-broadcast cross-ownerships in the absence of any changed circumstances, in the absence of any record evidence of harm arising out of such ownerships, and without any regard for the Commission's consistent and contrary interpretation of public policy and the Communications Act.

The decision of the court below raises important issues as to the proper role of a court in reviewing agency action which warrant Supreme Court review. The court below has substituted its judgment for that of the Commission on matters of public policy; it has improperly held that an agency may not weigh and apply standards in a different manner when it is acting retroactively than when it is acting prospectively; it has attempted to create a virtually irrebuttable presumption in favor of one important policy which would deprive the agency of the discretion to balance various components under its public interest mandate; and it has improperly usurped an agency function by directing the remedy the agency must adopt.

1. The effect of the decision is to deny the Commission the discretion to balance competing policy considerations so as to reach a result different from that preferred by the court. Moreover, the court's result is inconsistent with the approach the Commission has followed for more than thirty years in fashioning its ownership rules, and in repeatedly finding that existing newspaper-broadcast cross-ownerships have operated in the public interest.[5]

[5] Newspaper owners have never been considered disqualified to hold broadcast licenses. In the 1940's the Commission decided to prevent undue concentration of control by newspaper-broadcast cross-owners on a case-by-case basis rather than by rule. *Newspaper Ownership of Radio Stations*, 6 Fed. Reg. 1508, 3302 (1940), 9 Fed. Reg. 702 (1944).

These rules have codified a Commission policy in favor of diversified ownership of broadcast media. However, the Commission has always taken into account other considerations too, particulary the need to avoid unnecessary disruption of existing services upon which the public has become accustomed to rely. Generally, therefore, these ownership rules have only applied prospectively, with little or no divestiture required.[6]

When the 1953 ownership rules were judicially challenged, this Court upheld the Commission's rulemaking authority to place numerical limitations on the number of commonly owned stations in the same service. *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956). On remand to the District of Columbia Circuit, the specific limits established by

[6] The Commission's chain broadcasting regulations, promulgated in 1941, generally grandfathered ownership by radio networks of individual stations. The Commission stated that it might have acted differently if this question had arisen before such ownerships had actually come into being. Under the circumstances, however, it ordered divestiture only where two AM stations were licensed to the same network in the same area, or where the available facilities were so few or so unequal that the network had essentially no competition. *Report on Chain Broadcasting* (Order No. 37, Docket No. 5060) (1941). When, in 1953, the Commission limited to seven, seven, and five, respectively, the number of AM, FM and TV stations which could be under common control, it deliberately set these limits at a level that would not require extensive divestiture because it believed this would be "unduly disruptive." *Multiple Ownership Rules* (Docket No. 8957), 18 FCC 288, 292. In the few instances when the limits were exceeded, divestiture was dealt with case by case. *Id.* at 295.

When the Commission first adopted rules which prohibited a single party from owning two or more AM radio broadcast stations in the same area, *Multiple Ownership of Standard Broadcast Stations*, 8 Fed. Reg. 16065 (1943), approximately 20 existing combinations were required to divest on a case-by-case basis, *FCC Eleventh Annual Report* (1946), p. 12. However, in 1964, when the Commission amended its rules to reflect stricter and more precise stanadrds for determining prohibited overlap (AM, FM or TV), no divestiture was required of the numerous existing combinations. *Multiple Ownership Rules* (Docket No. 14711), 45 FCC 1476. Nor did the Commission require divestiture when, in 1970, it adopted rules prohibiting common ownership of television and radio stations in the same market. *Multiple Ownership Rules* (Docket No. 18110), 22 FCC 2d 306, as modified 28 FCC 2d 662.

the Commission were sustained on the ground that they were based on the Commission's experience, "coupled with a design to avoid undue disruption of existing service." *Storer Broadcasting Co.* v. *United States*, 240 F.2d 55, 56 and n. 3. See also *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 206–207 (1943) where this Court in affirming the chain broadcasting regulations, expressly noted the Commission's reluctance to order more extensive divestiture.

After many years of encouraging common ownership of newspaper-broadcast stations in the same community, the Commission, in 1970, initiated the rulemaking proceeding reviewed below to consider, among other things, whether changed circumstances warranted either a prospective ban or the divestiture of existing co-located newspaper-broadcast combinations. Further Notice of Proposed Rulemaking, 22 FCC 2d 339, 346. The Commission was interested in determining whether either of these courses of action was necessary to promote diversity or was otherwise required by the public interest, but at the same time it expressed concern about the disruptive effects of divestiture. *Id.* at 348. This concern took on added significance when the record below revealed no evidence of specific abuses or public interest harm arising from newspaper-broadcast cross-ownerships, let alone a pattern of abuse or harm warranting across-the-board divestiture (App. B, pp. 93 n. 26, 94n. 27, 100, 104). The Commission thus had to decide whether a policy in favor of diversification should now be treated as controlling, or whether other competing policies, most notably that of avoiding disruption, should outweigh the diversification policy under certain circumstances (Id. p. 93).

In evaluating what steps should be taken in regard to existing cross-owned combinations, the Commission fashioned a divestiture rule reflecting this Court's observation that the statutory public interest standard might not be met when "the publisher of the sole newspaper in an area applie[d] for a license for the only available radio and television facilities, which, if granted, would give him a monopoly of that area's major media of mass communications." *United States* v. *Radio Corp. of America*, 358 U.S. 334, 351–352 (1959). Thus, the

Commission's rule required divestiture of all newspaper-broadcast combinations which, in the agency's view, had an effective monopoly over local mass media.[7]

The court below conceded that, in fashioning this divestiture rule in the absence of any evidence of abuses, the "Commission necessarily had to rely primarily on policy, not factual considerations" (App. A, pp. 37–38). However, rather than give deference to a decision based upon various competing public policy judgments, "an area where administrative judgments are entitled to the greatest amount of weight by appellate courts," *SEC* v. *Chenery Corp.* 332 U.S. 194, 209 (1946), the court below approached the same policy considerations differently to reach a result which it preferred.

This was improper, for it is well established that a reviewing court is not "empowered to substitute its judgment for that of the agency." *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System,* 419 U.S. 281, 285 (1974), quoting from *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 416 (1971). It is the agency which is charged with assessing the relevant public interest, "both existing and foreseeable," and the court does not substitute the Commission's balance with "one more nearly to its liking." *Permian Basin Area Rate Cases,* 390 U.S. 747, 792 (1968). The court of appeals thus exceeded the proper role of a reviewing court vis-a-vis administrative agencies.[8]

The Commission was clearly acting properly when it decided that a retroactive application of policy raised different considerations than when it applied a policy only prospectively.

[7] The divestiture rule for effective monopolies merely particularized the Commission's conception of the public interest from a purely structural perspective. Newspaper-broadcast combinations unaffected by this rule were permitted to continue. However, the Commission retained its long-standing *ad hoc* policy that a showing of specific abuses arising out of the cross-ownership combination could result in a forfeiture of the broadcast license (App. B, pp. 103–104 n. 49).

[8] The court below made it clear that it did not rest its holding in this case on antitrust principles (App. A, p. 57, n. 170). This is not, therefore, an antitrust case in which a court has its own expertise, but rather, it involves issues of communications policy where the court may not substitute its judgment for that of the agency.

See *American Airlines* v. *Civil Aeronautics Board,* 192 F. 2d 417, 420 (D.C. Cir. 1951). It is this distinction which allows the agency the discretion to grandfather established service in the interests of preserving that service to the public. See *Buckeye Cablevision* v. *FCC,* 387 F. 2d 220, 227–228 (D.C. Cir. 1967), citing *United States* v. *Maher,* 307 U.S. 148 (1939).[9] In limiting divestiture to effective monopoly situations, the Commission decided that an attempt to promote diversity in non-monopoly situations did not outweigh the likelihood of harm occasioned by the disruption of existing services (App. B, p. 93).[10] The court of appeals did not disagree that this was a relevant consideration. Rather, the court, in its attempt to promote diversity, tried to leave room for the continuing importance of the factor of minimizing disruption by asserting that "the new owners will become the beneficiaries of any unofficial policy of continuity" (App. A, p. 54). The Commission might have adopted what could be described as a one-time upheaval approach, but that did not afford the court the au-

[9] In addition to its action in fashioning its ownership rules, the Commission has generally disfavored the retroactive application of new requirements. See, *e.g., FM Broadcast Rules,* 40 FCC 720, 725–26 (1962) (existing "supermaximum" FM stations grandfathered); *Daytime Skywave Transmission Rules,* 18 Rad. Reg. (P&F) 1845, 1854 (1959) (existing station interference grandfathered); and *CATV Rules,* 2 FCC 2d 725, 785 (1966) and 36 FCC 2d 143 (1972) (existing CATV signals grandfathered). In all of these cases, the Commission's purpose was to avoid disruption of established service. The 1966 cable grandfathering was upheld in the *Buckeye Cablevision* case, *supra.* See also *Telephone Terminal Equipment Rules,* 59 FCC 2d 83 (1976) (certain types of terminal equipment grandfathered under registration program).

[10] Although the Communications Act does not afford the same degree of security found in other laws, the court of appeals has warned that the Commission may not simply disregard "legitimate renewal expectancies implicit in the structure of the Act." *Greater Boston Television Corporation* v. *FCC,* 444 F. 2d 841, 854 (1970), *cert. denied,* 403 U.S. 923 (1971). See *Alianza Federal de Mercedes* v. *FCC,* 539 F. 2d 732, 736 (1976). The Commission's concern for disrupting existing service in this rulemaking proceeding went beyond, of course, any private interests of established licensees; it also focused upon the interruption of service to the viewing and listening public (App. B, pp. 93, 95).

thority to impose a balance more nearly to its liking. *Permian Basin Area Rate Cases, supra.*[11]

Interference with the Commission's rulemaking authority is sharply illustrated by the court's vacation of those rules which required divestiture of commonly owned newspaper-broadcast interests in a market not served by any other independently owned local newspaper or broadcast facility. The court took the view that in such monopoly markets there may be no less diversity than in larger markets with more competing voices (App. A, p. 59). In other words, the court states that the Commission might have considered adding additional frequencies to these markets, rather than requiring divestiture; it is the larger markets, the court concluded, in which divestiture "may be more useful" (App. A, p. 59). This is not only fundamentally inconsistent with the court's own presumption that additional voices promote diversity, but totally at odds with the court's expression on other occasions that it is the smaller, rather than larger, markets which probably suffer from a lack of diversity.

[11] The court similarly decided to balance differently other policies advanced by the Commission disfavoring divestiture. The Commission expressed concern that the great demand for equity capital to finance divestiture transactions would set in motion a chain of events with a resulting reduction in working capital and profit accumulation otherwise available for quality programming (App. B, pp. 83, 93). The court, while apparently not disagreeing that this was a relevant concern, relegated it to "lesser" importance because this same undesirable effect might also occur when the Commission permitted voluntary transfers to new owners (App. A, pp. 56–57).

The court also dismissed the undesirable effect the Commission attached to the possibility that divestiture would risk the loss of owners who participated in the daily operations of their stations, a factor of substantial importance in comparative proceedings between applicants for new facilities. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395–396. As the court recognized, however, three quarters of existing combinations are locally owned (App. A, pp. 52–53). Although local ownership without any participation in the operation of a station is given no credit in a comparative proceeding, it was not unreasonable for the Commission in a policy making context to take into account the intangible benefits of local ownership, a factor of even some importance in a comparative proceeding. 1 FCC 2d, *supra*. The court, however, preferred to speculate that local entrepreneurs would find broadcasting an attractive investment, and that therefore, there would be no loss of local ownership (App. A, p. 53).

See *Greater Boston Television Corporation* v. *FCC, supra*, 444 F. 2d at 859–860; *Massachusetts Bay Telecasters* v. *FCC*, 261 F. 2d 55, 64–65, n. 24 (D.C. Cir. 1958); *Fidelity Television, Inc.* v. *FCC*, 515 F. 2d 684, 701, (D.C. Cir. 1975) *cert. denied*, 423 U.S. 926 (1975).

The decision of the court strikes at the very heart of the discretion Congress confided to the Commission, not the courts, to be satisfied that the public interest will be served, see *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 229 (1946). An agency's function is not merely to appraise facts and draw inferences, but also to bring its expert judgment to bear on a problem and to determine "from its analysis of the total situation on which side of the controversy the public interest lies." *U.S.* v. *Detroit & Cleveland Navigation Co.*, 326 U.S. 236, 241 (1945). This Court should review the far-reaching interference with the administrative process by the court below.

2. In addition to substituting its judgment for that of the Commission, the court below has now elevated what has heretofore been considered one important component of the public interest standard into binding law. The court holds that because of First Amendment considerations cross-ownership must be presumed to be contrary to the public interest standard of the Communications Act and that in this proceeding, the presumption must be given "controlling weight" over all other public interest policy factors (App. A, pp. 56–57; App. E, pp. 166–167). In reaching this conclusion, the court has failed to observe the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1967). Whether there are such compelling reasons, however, must be determined by a careful evaluation of the Commission's reasoning in light of policies embodied by Congress in the public interest standard of the Communications Act. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 121–122 (1972).

The diversification policy adopted by the Commission more than thirty years ago was drawn from both the First Amend-

ment and the antitrust laws. There is no dispute between the court and the Commission that the public interest standard invites reference to First Amendment principles, *CBS* v. *DNC*, *supra*, 412 U.S. at 122, and antitrust policies, *United States* v. *Radio Corporation of America*, *supra*, 358 U.S. at 351. However, although the Commission, with judicial approval, has always emphasized the importance of diversification, neither the Commission nor the courts, including this Court, have ever suggested that the First Amendment compels what has now been declared a virtually irrebuttable presumption against cross-ownership.

The court of appeals now has required the Commission to adopt this controlling presumption because the court is of the view that the Communications Act, the First Amendment, and the long-standing importance of the Commission's diversification policy compelled the presumption that cross-owned stations do not serve the public interest (App. A, p. 51). There is nothing in the Communications Act or its legislative history, however, which mandates this sweeping conclusion or any other one concerning cross-ownership different from that reached by the Commission. Congress chose to leave such questions with the Commission. *CBS* v. *DNC*, *supra*, 412 U.S. at 122. When there have been doubts as to the wisdom of mandating rather than allowing promotion of First Amendment principles, the courts have not imposed such an "inflexible response as a matter of constitutional law." *Public Interest Research Group* v. *FCC*, 522 F.2d 1060, 1067 (1st Cir. 1975) (footnote omitted), *cert. denied*, 424 U.S. 965 (1976). See also *CBS* v. *DNC*, *supra*. The court of appeals not only failed to give proper deference to the Commission's judgment on this matter, but its declaration that diversification must be given "controlling" weight in this rulemaking proceeding is entirely inconsistent with the court's own past recognition of the Commission's discretion in this area.[12]

[12] Contrary to its holding concerning diversity, the court below recognized that antitrust policy is only one component of the public interest standard, and that the Commission had discretion not to give it *prima facie* effect (App. A, p. 57, n. 107).

For example, the court below consistently has stated only that "(d)iversification is a factor properly to be weighed and balanced with other important factors." *Citizens Communications Center* v. *FCC*, 447 F. 2d 1201, 1214, n. 36 (D.C. Cir. 1971). See also, *Fidelity Television*, *supra*, 515 F. 2d at 709. Diversification was never presumed, either by the Commission or the court, to have "controlling" weight over other policies. Instead the court previously has made clear that it does not intend to "impinge at all upon the Commission's substantive discretion in weighing factors and granting licenses. . . ." *Citizens*, *supra* at n. 33.

The application of this general rule of statutory construction is as appropriate in the context of the multiple ownership rulemaking proceeding as it is in the context of an adjudicatory proceeding.[13] And yet, the decision of the court profoundly deprives the Commission of this same substantive discretion to give meaning to the public interest, convenience and necessity in a rulemaking proceeding. We submit that this fundamental departure from prior statutory construction raises a fundamental issue which should be reviewed by this Court.

2. The decision below also raises a significant issue concerning the court of appeals' power to direct a particular remedy rather than to order a remand of the proceeding to the agency for reconsideration in light of legal errors the court believed to exist. The court of appeals found that the Commission had committed error in insisting that before it could require divestiture of newspaper-broadcast combinations, it had to find evidence of abuses

[13] See, e.g., *Citizens TV Protest Comm.* v. *FCC*, 348 F.2d 56 (D.C. Cir. 1965); *Clarksburg Publishing Co.* v. *FCC*, 225 F.2d 511, 518–519 (D.C. Cir. 1955); *Mansfield Journal Co.* v. *FCC* 180 F.2d 28, 35 (D.C. Cir. 1950); *Pinellas Broadcasting Co.* v. *FCC*, 230 F.2d 204, 208–209 and n.6 (D.C. Cir. 1956), *cert. denied*, 350 U.S. 1007 (1956); *Scripps-Howard Radio* v. *FCC*, 189 F.2d 677, 683 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 830 (1951).

(App. A, p. 50; App. E, p. 165).[14] The court also believed that the Commission had failed to explain adequately why it did not adopt the presumption that cross-ownership was contrary to the public interest (App. A, p. 52). However, rather than order a remand to the Commission for reconsideration, the court ordered the Commission to adopt a rule requiring, in effect, across-the-board divestiture (App. A, p. 60; App. E, p. 167).

The court below has violated the guiding principle that "the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the Commission for reconsideration." *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952), citing *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 and *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37 (1948). On remand, the Commission might have formulated a different rule or decided that a rule was inappropriate in light of the appellate court's legal interpretations. However, when the court decreed that the Commission must adopt a rule requiring divestiture of all co-located, cross-owned newspaper-broadcast combinations, "it usurped an administrative function." *FPC* v. *Idaho, supra.* We submit that this question is one of fundamental importance which also warrants review by this Court.

[14] As previously indicated, n. 3, *supra*, the Commission explicitly recognized that "it was not necessary to have proof of abuses" before it could require divestiture. (App. B, p. 95 n. 29). The court of appeals was thus mistaken when it described the Commission as having believed that it was required to find actual evidence of abuse before it could order divestiture (App. E, p. 165; App. A, p. 50). But even if the court had been correct in its description, and even if this had constituted error by the Commission, the proper course would have been to remand the proceeding to afford the Commission an opportunity to determine whether, in light of this assumed error, it would have formulated a different rule. The court, however, did not do this. Instead, it proceeded to substitute its own policy judgment in favor of divestiture for that of the Commission.

CONCLUSION

The decision below is contrary to established precedent on questions of basic importance to the administration of the Communications Act of 1934 and to administrative law generally. It goes to the essential relationship between agencies and reviewing courts. It is respectfully submitted that the petition for certiorari should be granted.

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